(2)

No. 99-1842

Supreme Court, U.S.
FILED
JUN 19 2000
CLERK

In The Supreme Court of the United States

CLYDE W. BANKS AND MARGARET L. BANKS,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
H. Carter Redd
McGUIRE, WOODS, BATTLE & BOOTHE LLP
901 East Cary Street
Richmond, VA 23219
(804) 775-4319

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

11pp

QUESTION PRESENTED

I. WHETHER IN THIS DIVERSITY CASE THE SUPREME COURT OF THE UNITED STATES SHOULD REVIEW THE CONSIDERED DETERMINATION OF THE COURT BELOW ON AN ISSUE OF STATE LAW WHEN NO FEDERAL QUESTION IS PRESENTED?

CORPORATE DISCLOSURE STATEMENT

Virginia Electric and Power Company is a subsidiary of Dominion Resources, Inc., a publicly traded corporation owning 100% of the stock of Virginia Electric and Power Company.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

ARGUMENT..... 1

CONCLUSION..... 4

TABLE OF AUTHORITIES

FEDERAL CASES

Banks v. Virginia Electric & Power Co., 2000 U.S. App. LEXIS 2400 (4th Cir. Md. Feb. 17, 2000) 2

Huddleston v. Dwyer, 322 U.S. 232 (1944)..... 4

Matthews v. United States, 825 F.2d 35 (4th Cir. 1987).....1

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).....4

Richards v. United States, 369 U.S. 1 (1962).....2, 4

Thomas v. American Home Products, 519 U.S. 913 (1996).....2, 4

STATE CASES

Bishop v. Twiford, 562 A.2d 1238 (Md. 1989)..... 3

Hauch v. Connor, 453 A.2d 1207 (Md. 1983).....3

Powell v. Erb, 709 A.2d 1249 (Md. 1998).....3

FEDERAL STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1332.....1

28 U.S.C. § 1446.....1

28 U.S.C. § 2101.....1

MISCELLANEOUS

9 Arthur Larson & Lex K. Larson, Larson's Workmen's Compensation Law § 88.11.....3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Neither the United States Constitution nor any federal statute is at issue. Petitioners have listed under this heading 28 U.S.C. §1446, governing removal, and 28 U.S.C. § 1332, governing diversity jurisdiction, but Petitioners do not claim that the case was improperly removed or that the court below lacked diversity jurisdiction.

ARGUMENT

In Petitioners' Petition for a Writ of Certiorari ("Petitioners' Petition") they do not complain about any interpretation or application of federal law. Indeed, Petitioners' only citations to federal authority in their Argument are to one federal case on an issue wholly collateral to their appeal[1] and to two federal procedural statutes concerning writs of certiorari, 28 U.S.C. §§ 1254 and 2101.[2] *See* Petitioners' Petition at iii. All other substantive authority Petitioners have cited is to Maryland case law and to Maryland statutes.

[1] Petitioners have cited *Matthews v. United States*, 825 F.2d 35 (4th Cir. 1987), as additional authority for the proposition that Maryland workers' compensation law would not treat VEPCO as a statutory employer immune from suit if Maryland law applied. The purported ground on which Petitioners seek to appeal is their claim that the Fourth Circuit and the U.S. District Court for the District of Maryland should not have ruled that Virginia law, not Maryland law, applies. *Matthews* thus has nothing to do with the controlling question whether the courts below correctly construed Maryland choice of law rules in reaching their decisions.

[2] Petitioners have listed the federal diversity jurisdiction statute, 28 U.S.C. § 1332, and the federal removal statute, 28 U.S.C. § 1446, under the heading, "CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED." Petitioners' Petition at 1. Neither statute is cited or relied on in the body of Petitioners' Petition.

This Court "ordinarily accept[s] the determinations of Courts of Appeals on questions of state law." *Richards v. United States*, 369 U.S. 1, 16 n.35 (1962). There is nothing extraordinary or exceptional about this case. Petitioners are simply unhappy with the result below, and this Court "can and should exercise [its] discretion to deny the petition for writ of certiorari" in such a case. *Thomas v. American Home Products*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring).

Both the district court and the Fourth Circuit correctly ruled that Petitioners could not sue Virginia Electric and Power Company ("VEPCO"), because under Virginia workers' compensation law VEPCO was Appellant Clyde Banks' statutory employer and therefore immune from suit for the work-related injuries he alleged. Petitioners claim that Maryland law would have allowed the suit and that both courts below misconstrued Maryland choice of law rules in applying Virginia law. Thus Petitioners' only ground for requesting certiorari is their argument that the courts below misconstrued Maryland state law regarding choice of law.

In their Petition for a Writ of Certiorari, Petitioners argue that the United States District Court for the District of Maryland (the "District Court") erroneously applied the lex loci delicti rule as Maryland state law's choice of law rule and that the Fourth Circuit's affirmance was also in error. Petitioners' Petition at 4. Petitioners' restatement of the courts' holdings is not precisely correct. The Fourth Circuit agreed "with the district court's conclusion that Maryland state courts would enforce Virginia's exclusive remedy bar in this case." *Banks v. Virginia Elec. & Power Co.*, 2000 U.S. App. LEXIS 2400 (4th Cir. Md. Feb. 17, 2000) (cited in the Appendix to Petitioners' Petition at 1a-17a, 9a). The courts below did not simplistically apply the lex loci delicti rule. Instead they predicted that Maryland courts would observe the majority rule that where a statutory employer is protected

from suit by its state's Workers' Compensation Act, forum courts in other states enforce that bar as a matter of policy.

Petitioners relied on a line of Maryland cases in which Maryland courts applied Maryland law instead of another state's law to allow residents to sue co-employees for work-related torts. Petitioners' Petition at 4-8 (citing *Hauch v. Connor*, 453 A.2d 1207 (Md. 1983); *Bishop v. Twiford*, 562 A.2d 1238 (Md. 1989); *Powell v. Erb*, 709 A.2d 1249 (Md. 1998)). As both courts below pointed out, however, the seminal case in this line distinguished itself from cases like the one at hand where the employee seeks to sue, not a fellow employee, but an indirect employer. Petitioners' Petition at 8a, 22a-23a (opinions of the Fourth Circuit and the district court respectively discussing *Hauch*). The purpose of workers compensation statutes is to induce employers to undertake the burden of supplying workers compensation insurance in return for immunity from suit. Indirect employers like VEPCO, who have undertaken to cover employees, differ substantively from fellow employees, who have not. In return for VEPCO's undertaking, Virginia law provides VEPCO immunity as a statutory employer, and the general rule is that other states' courts will honor that grant of immunity. *See* 9 Arthur Larson & Lex K. Larson, *Larson's Workmen's Compensation Law* § 88.11, at 16-201 (1999).[3] In light of *Hauch's* clear analysis, the courts below were

---

[3] Petitioners refer to the rationale by which a state recognizes another's immunization of a statutory employer as the "shared burden rationale." Petitioners' Petition at 8. Petitioners then claim that because VEPCO contractually required Banks' direct employer to insure its workers, VEPCO "did not, in fact, share the risks of Petitioner's injury" and "the general rule of employer immunity does not apply." As the Fourth Circuit correctly observed there is no reason to believe that VEPCO could escape its statutory workers' compensation liability through private contract. Appendix to Petitioners' Petition at 10a (Fourth Circuit opinion citing numerous Maryland cases). Because VEPCO retained potential liability the "shared burden rationale" applies here to invoke the general rule honoring Virginia's grant of immunity.

practically compelled to predict that Maryland would follow the general rule and enforce Virginia's statutory employer bar. Certainly that conclusion was at least permissible and in any event presents no issues requiring resolution by this Court.

CONCLUSION

On the record this case was correctly decided. By no stretch of the imagination does it rise to the exceptional level necessary for this Court to engage in second-guessing the intermediate federal appellate court's considered determination of a question of state law. *See Thomas*, 519 U.S. at 915 (Scalia, J., concurring); *Richards*, 369 U.S. at 16 n.35; *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

Consequently, the writ should be denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
H. Carter Redd
McGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4319